



April 30, 2001

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-1755

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 146588.

The Texas Department of Criminal Justice (the "department") received a request for information, paraphrased as follows:

1. For the year 2000, monthly compliance reports and all internal audit reports for Dallas, Harris and Bexar counties, including the submission of unit supervisors.
2. For the year 2000, a listing of each caseworker and officer that failed to complete each and every contact, and the type and number of contacts missed.
3. All information (including reports and investigations) leading up to and pertaining to the shooting of one named employee by another.
4. All information (including reports and investigations) leading up to and pertaining to the drug charges and subsequent resignation of a named individual.

5. All information (including reports, investigations, and allegations) relating to the case file of a named individual, under the supervision of the requestor.
6. All information (including reports, investigations, and allegations) regarding the sexual harassment incident involving two named individuals.

You have submitted for our review information that is responsive to items 3, 4, and 6. You inform this office that except for the submitted information, the department withdraws its initial request for a decision from this office because the remaining responsive information will be released to the requestor. We understand you to assert that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common law right to privacy. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address a procedural matter. You represent to this office that the request was received on February 23, 2001. The information you have provided indicates that the request was sent by e-mail to you on February 13, 2001. You state: "I received it (I reviewed my email) on February 23, 2001." Evidently, the e-mail request was received *by the department* on February 13, 2001 (the same day that it was sent). The deadlines under section 552.301 of the Act pertain to the date the *governmental body* receives a request. *See* Gov't Code § 552.301(a), (b), (d), (e)(1)(C). Thus, the date that you (or any department employee) first *reviewed* the request is irrelevant. Accordingly, in future requests for a decision from this office, you must provide a signed statement as to the date on which the department received the request (or evidence sufficient to establish that date), not the date the request was first reviewed. *Id.* § 552.301(e)(1)(C).¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The common law right of privacy is incorporated into the Act by section 552.101. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

¹Based on the above, and assuming that the department was closed for business on President's Day, February 19, 2001, the 10th business day after the date the department received the request was February 28, 2001, and the 15th business day after the date the department received the request was March 7, 2001. *See* Gov't Code § 552.301(b), (e). Having reviewed the dates this office received your facsimile correspondence in this matter, we thus conclude that the department timely complied with these deadlines.

Most of the information at issue pertains to an investigation of alleged sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Unlike *Ellen*, none of the information at issue constitutes an adequate summary of the investigation and, therefore, you must release the submitted documents. However, based on *Ellen*, the department must redact from these documents information that reveals the identities of the victim and the witnesses. We have marked the information that must be redacted. We find that none of the remaining information in the submitted documents is protected by a common law right of privacy.

We also note, however, that the documents contain the home address, home telephone number, and social security number of current or former department employees. For those individuals who were current employees of the department at the time the department received the request, the department must redact this information from the documents, pursuant to section 552.117(3) of the Government Code. *See* Gov't Code § 552.117(1), (3); *see also id.* § 552.024. Section 552.117(3) is inapplicable, however, to an individual who was not employed by the department at the time the department received the information request. For these former department employees, the department may withhold the above-referenced information, under section 552.117(1), only if the former employee made a request for confidentiality under section 552.024 of the Act prior to the department's receipt of the present request for this information. The department may not withhold this information under section 552.117 for those former employees who did not make a timely election to keep the information confidential. We have marked the information at issue.²

Even if the social security numbers are not excepted from disclosure under section 552.117, this information may nevertheless be subject to required withholding under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related

²The submitted documents contain section 552.117 information of the requestor, as well as other information of the requestor that is or may be confidential by laws intended to protect the requestor's privacy. We have not marked any of this information for redaction, however, because unlike the general public, the requestor has a special right of access to this information. *See* Gov't Code § 552.023.

records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the department must redact from the submitted documents the information we have marked that implicates the common law right of privacy. The department must also redact the section 552.117 information we have marked for those individuals who were employed by the department at the time the department received the present request. If the individual was at that time a former department employee, the individual's section 552.117 information is excepted from disclosure under section 552.117 only if the individual elected confidentiality under section 552.024 prior to the department's receipt of the present request. Social security numbers that the department obtained or maintains pursuant to a provision of law enacted on or after October 1, 1990 must be withheld pursuant to federal law. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

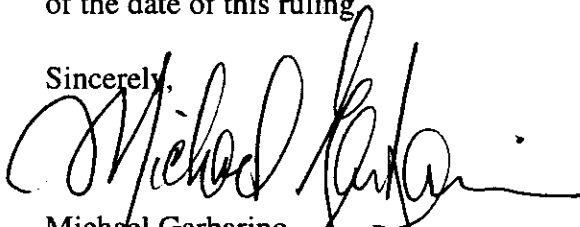
of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 146588

Encl. Submitted documents

cc: Mr. David Robison
3721 Morningview
Dallas, Texas 75241
(w/o enclosures)